STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **CELLCO PARTNERSHIP** **D/B/A VERIZON WIRELESS** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period July 1, 2008 through June 30, 2010.	:	DETERMINATION DTA NO. 827179

Petitioner, Cellco Partnership d/b/a Verizon Wireless, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period July 1, 2008 through June 30, 2010.

A hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York on February 24, 2017 at 10:30 A.M., with all briefs to be submitted by July 14, 2017, which date commenced the six-month period for issuance of this determination. By letter dated January 4, 2018, this six-month period was extended for an additional three months (Tax Law § 2010 [3]). Petitioners appeared by Ryan, LLC (Brian L. Browdy, Esq. of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Lori Antolick, Esq., of counsel).

ISSUE

Whether petitioner's purchases of various items of tangible personal property, and services on such tangible personal property, used at its Orangeburg, New York, facility, were exempt from sales and use taxes pursuant to Tax Law §§ 1115 (a) (12-a) and 1105 (c) (3) (x).

FINDINGS OF FACT

1. Petitioner, Cellco Partnership d/b/a Verizon Wireless, provides wireless cellular telecommunications services to more than 100 million customers nationwide.

2. As part of its business, petitioner operates a data center in Orangeburg, New York, as well as other similar facilities elsewhere in New York. The Orangeburg data center houses mainframe servers, data storage devices, network equipment, power distribution units, uninterruptible power supply batteries, and special climate control equipment.

3. The hardware at the Orangeburg facility, and the software embedded on some of it, hosts two software applications petitioner regards as mission critical to its telecommunications business: (i) Virtual Information System Integrated Online Network (VISION); and (ii) Mobile Telephone Activation System (MTAS). While this equipment also hosts other applications, it is dedicated primarily to running VISION, with around 85 to 90 percent of its computing capacity devoted to this purpose.

4. The VISION application was developed by petitioner in the early 1990s and it runs on mainframes and ancillary support equipment at the Orangeburg facility. Karl King, who oversees petitioner's mainframe database administration, application performance, and product support and infrastructure, testified as to the VISION application. As explained by Mr. King, when a customer purchases a new phone it is not useable until VISION activates it to run on petitioner's cellular network. He explained that when a new customer walks into a Verizon retail store to buy a new phone, the sales employee accesses the VISION software, which shares the new customer data with MTAS, which in turn communicates with other elements of the Verizon network, which communicate back to VISION to activate the device and add the customer to the

network. This process works in the same basic way when an existing customer upgrades his or her device.

5. Petitioner also utilizes the VISION software in implementing and changing customer's service plans. Mr. King explained that after a customer activates a phone, the sales representative will use VISION to access price plans and features to model different packages for the customer. Once the customer chooses a plan, VISION is used to create an order, which is then shared with the MTAS application, which shares the data with the Verizon network. The process works the same way when an existing customer changes his or her service plan.

6. VISION is also used in customer billing. VISION software captures a customer's voice, data, and text usage; based on the customer's price plan, features, and promotions, VISION is then used to create the customer bill.

7. Without the VISION application, petitioner could not add new customers to its network; existing customers could not change their price plans, add new features, or upgrade their phones; and, petitioner could not bill customers for their phone usage. According to Mr. King, after a period of time, the phone "is not going to work, other than calling [customer] care." However, Mr. King also testified if the VISION system were to "go down," a customer would be unable to pay a bill or change a pricing plan, but would still be able to make phone calls, and further clarified that if VISION were not working for a month, active customers in good standing could continue to make phone calls.

8. VISION also works with petitioner's Interactive Voice Recognition (IVR) unit, another application hosted on the equipment at the Orangeburg facility. Mr. King described IVR as "that robot" customers get in lieu of a live person when they call customer care for things like

upgrading their devices. In these instances, he explained, IVR communicates "back and forth" with VISION. IVR works in conjunction with VISION in actually programming and activating the customer's device. He stated that when someone gets a new phone, he or she calls a special number and the call is routed to a network switch, which routes the call to the IVR system, which communicates with VISION to obtain the new phone number and other network attributes, which are then programmed into the device.

9. MTAS is another application that runs on computer hardware at the Orangeburg facility and works hand-in-hand with the VISION software. MTAS performs many functions but its primary job is in receiving orders from VISION for the purpose of adding customers and enabling them to make calls. The MTAS application "pushes" order information out to the Verizon network to create a customer profile, which is then communicated back to VISION.

10. According to petitioner, without MTAS and its interaction with VISION and, thus, without the mainframe technologies and related components necessary for hosting these applications, it would not be financially viable for it to stay in business. According to petitioner, without the hardware and software at the Orangeburg facility, petitioner could not activate new customers, or allow existing customers to upgrade their devices or change their service plans in any reasonable amount of time.

11. In 2009, petitioner acquired cellular provider, Alltel Corporation, adding more than ten million new customers to its network. In order for VISION to accommodate this large influx of new users and devices, petitioner had to make significant upgrades to the mainframes and related hardware and software that hosted this application.

12. During the period July 1, 2008 through June 30, 2010 (audit period), petitioner made

extensive purchases of server, disk, tape, memory and other mainframe component upgrades.

13. Prior to the Alltel acquisition, petitioner had a regular program of performing system upgrades at the Orangeburg facility.

14. In June 2012, at the conclusion of a sales tax audit, petitioner filed a refund claim with the Division in the amount of $19,184,576.20 for the audit period. The basis for the claim was that the hardware and software are exempt under Tax Law § 1115 (a) (12-a), and that, to the extent that this exemption applies, the installation, maintenance, and other services performed on the exempt hardware and software are likewise exempt under Tax Law § 1105 (c) (3) (x).

15. These purchases are summarized on two different documents. First, petitioner provided the auditor reviewing its claim an Excel file containing hyperlinks to all of the invoices, as well as a field for the auditor's comments. The auditor spent more than 50 hours reviewing these invoices and entering her remarks. The single largest vendor of the mainframe technologies and ancillary components purchased by petitioner during the audit period was International Business Machines Corp (IBM). There were 49 individual invoices from IBM, with the claim covering 95 unique line items. Of these, 50 were for server upgrades; 17 for prepaid hardware maintenance; 13 for prepaid software maintenance; 12 for software licenses; and 1for service oriented architecture equipment. The amount of refund claim sought on these purchases is $10,340,056.72.

16. Petitioner also made similar purchases from Agilysys Inc., its second largest vendor by dollar amount. There were 53 separate invoices from this vendor, and the refund claim sought on purchases from Agilysys is $2,267,183.07.

17. Petitioner likewise purchased mainframe adjuncts or ancillary components from

Hewlett Packard (HP), its next largest vendor by dollar amount. There were 58 different invoices from HP, with the claim encompassing 216 individual line items. The amount of refund sought in connection with purchases from HP is $2,099,174.30.

18. Petitioner also made extensive purchases of such equipment from Saturn Business Systems. There were a total of 18 different invoices, with the claim covering 47 unique line items. These purchases consisted almost exclusively of servers and server maintenance, and server software and related maintenance; the only exception was 1 line item representing the purchase of a storage rack and shelves for the server equipment. The total refund sought on these purchases is $662,829.72.

19. Petitioner also purchased similar hardware, software, and related services from a variety of other vendors.

20. The Division's auditor assigned to audit the refund claim was under the belief that the tangible personal property and services upon which the refund claim was premised was used or consumed at cellular tower sites. After reviewing documentation that established sales tax was paid or use tax accrued on the tangible personal property upon which the refund claim was based, the Division sent a letter to petitioner indicating that $10,112,266.42 of the claimed refund would be granted. Subsequently, the auditor became aware that much of the tangible personal property and services upon which the refund was premised was not at any cell sites but was for tangible personal property and related services at petitioner's Orangeburg, New York, data center. On December 20, 2013, the Division sent a letter to petitioner withdrawing the refund disposition letter.

21. During a visit to petitioner's Orangeburg location, the auditor was told by petitioner's

employees that the facility is not a cellular site through which calls are transmitted. The Division's auditor was told that the equipment purchased during the period at issue was to carry out petitioner's customer billing and service functions. During that visit, the Division's auditor was told that call signals do not go through the equipment housed at the Orangeburg facility.

22. By letter dated February 21, 2014, the Division advised petitioner's representatives that it approved $49,553.01 of petitioner's refund claim and denied the balance of $19,135,023.19. By letter dated July 10, 2014, the Division directly advised petitioner that it approved $49,553.01 of petitioner's refund claim and denied the balance of $19,135,023.19. The portion allowed was for tax paid on non-taxable services, equipment used at cell sites, and purchases where both sales tax and use tax had been paid. With respect to the amount denied, the auditor gave different reasons for denying different refund items. For example, with respect to the refund claimed on purchases from vendors such as Iron Mountain Management Services, the explanation stated "[n]o ship to on invoice. No PO provided. Cannot verify if sales tax was paid in NY. Invoice does not give details of what was purchased."

23. As for the vast majority of the refund items denied, however, including the items purchased from IBM, Agilysys, HP, and Saturn Business Systems, the explanation stated: "Servers used at Orangeburg data center, not at cell site. Not used in transmitting telecom"; or "used at Orangeburg data center, not a cell site. Not used in transmitting telecom"; or some variation on this theme. Petitioner's petition concerns only its claim for items denied on this basis.

SUMMARY OF THE PARTIES' POSITIONS

24. Petitioner alleges that the Division erroneously denied its refund claim, conceding that

although cell signals do not go through the equipment housed at the Orangeburg, New York, facility, such equipment and software loaded thereon is mission critical to petitioner's business and without same petitioner would not be in business. In the alternative, petitioner contends that the purchases would be exempt because they constituted upgrades that allowed for the initiating, receiving, or switching of telecommunications services for sale.

25. The Division, in response, contends that the purchases at issue do not qualify for the exemption contained within Tax Law § 1115 (a) (12-a) because none of the equipment or software allowed for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale. The Division asserts that the VISION system that petitioner focused on is merely the gatekeeper to the systems that allow for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (a) imposes a sales tax on the receipts from "every retail sale" of tangible personal property. All sales of tangible personal property are presumptively subject to tax pursuant to Tax Law § 1132 (c) "until the contrary is established." Tax Law § 1115 sets forth a myriad of exemptions; the focus of the present matter is the exemption contained in Tax Law § 1115 (a) (12-a) which provides an exemption for:

> "Tangible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. Such tangible personal property exempt under this subdivision shall include, but not be limited to, tangible personal property used or consumed to upgrade systems to allow for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or

> monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. As used in this paragraph, the term 'telecommunications services' shall have the same meaning as defined in paragraph (g) of subdivision one of section one hundred eighty-six-e of this chapter."[1]

B. The question to be resolved here is whether the tangible personal property purchased by petitioner during the audit period, consisting mostly of computer hardware and components, to upgrade its VISION system at its Orangeburg, New York, facility was used or consumed directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale. In support of its position, petitioner relies upon ***Niagara Mohawk Power Corp. v Wannamaker*** (286 App Div 446 [4th Dept 1955], ***affd without opinion*** 2 NY2d 764 [1956]) and ***Matter of Peoples Telephone Company, Inc.*** (Tax Appeals Tribunal, Jan. 16, 2001), wherein it alleges that the Court's reasoning in ***Niagara Mohawk*** and subsequently adopted by the Tax Appeals Tribunal in ***Peoples Telephone*** compels a finding that the equipment, software and services meet the qualifications for exemption.

C. Petitioner's reliance on ***Niagara Mohawk*** is misplaced. First, and foremost, the test formulated in ***Niagara Mohawk*** involved an exemption statute much broader than that at issue herein. There, the court dealt with the application of a sales tax exemption for tangible personalty used or consumed "directly and exclusively" in the production of tangible personal property for sale. In that case, the petitioner produced electricity that was deemed to be tangible personal property. The parties therein agreed that the coal, boiler, turbine and generator were used "directly and exclusively" in the production of electricity but disagreed as to whether the

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[1] Tax Law § 1105 (c) (3) (x) provides an exemption for services with respect to property described in section 1115 (a) (12-a).

exemption applied to various ash and coal handling equipment that included conveyor belts that moved coal toward the boiler; slag lines, pumps and a railway that carried the ash from the boiler; various structures including concrete caissons and foundations that supported the machinery; and the building that housed the entire plant. In making its decision, the court formulated the following test: (i) is the disputed item necessary to production; (ii) how close, physically and causally, is the disputed item to the finished product; and (iii) does the disputed item operate harmoniously with the admittedly exempt machinery to make an integrated and synchronized system (***id.***).

Applying this test, the court held that the ash and coal handling system was not taxable because it worked together with the boiler to make up a system which supplied the power from which the electricity was produced. However, the court held that transformers that distributed electricity to Niagra Mohawk's customers were not exempt because such equipment was used in the distribution of electricity and not in the production of electricity.

D. Assuming that the test formulated in ***Niagara Mohawk*** is applicable, application of the same does not lead to the result which petitioner seeks. First, the equipment used at the Orangeburg, New York, facility was not necessary nor used to receive, initiate, amplify, process, transmit, retransmit, switch or monitor switching of telecommunications services. Rather the equipment was used for petitioner's VISION system whose function was to manage customer accounts, rate customer usage, and perform billing functions as well as control access to the network and provide customer service. The second and third questions posed by the court in ***Niagara Mohawk*** are not applicable to the exemption herein as the present proscribed activity is much narrower than that at issue in that case. In this case, the exemption is given for specific

equipment used in providing telecommunications services, i.e., that used in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services. The hardware and software at issue herein performs none of these functions. This equipment is more akin to the transformers at issue in ***Niagara Mohawk*** for which the exemption was denied.

E. Likewise, petitioner's reliance on ***Matter of Peoples Telephone Company, Inc.***, is also misplaced. In ***Peoples Telephone,*** the petitioner therein owned and operated pay telephones. At issue was whether the Division properly imposed sales and use taxes on the purchase of pay phone pedestals and enclosures or whether a predecessor exemption applied because they were used directly and predominantly in the initiating and receiving of telecommunications services. The Tribunal allowed the exemption, holding that there would be no meaningful reception or initiation of telephone communication at the pay phone locations. The Tribunal held that the pedestal and enclosure have an active causal relationship in the production of telephone communication despite that they did not actually perform the initiating and receiving of telephone communication. In reaching its conclusion, the Tribunal approved the reasoning set forth in ***Niagara Mohawk***. In this case however, while there is no question that the equipment used is mission critical to petitioner's operations in providing cellular telecommunications services, that factor does not lead to the conclusion that the exemption applies. Statutes granting exemptions from taxation are narrowly construed (***see Matter of International Bar Assn. v Tax Appeals Tribunal***, 210 AD2d 819 [3d Dept 1994], ***lv denied*** 85 NY2d 806 [1995]; ***Matter of Lever v New York State Tax Commn.***, 144 AD2d 751 [3d Dept 1998]). Tax Law § 1132 (c) provides that all sales described in Tax Law § 1105 (a) are subject to tax until the contrary is

established. In order to qualify for the exemption, petitioner bears the burden of clearly proving its entitlement to the exemption sought (***see Matter of Grace v New York State Tax Commn.***, 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 816 [1975]). Petitioner has not met that burden. If petitioner's interpretation were correct, then the court in ***Niagara Mohawk*** would have also extended the exemption to the transformers at issue therein as they can be said to be "mission critical" to Niagara Mohawk's ultimate sale of electricity because without the means to distribute electricity to customers, there would be no customers. The court did not. Similarly, in this case, the hardware, software and related services are not used in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services. As pointed out by the Division, cellular communications could still occur if VISION were not operational. For the same reasons the transformers did not qualify for the exemption in ***Niagara Mohawk***, the hardware, software and services at issue herein do not qualify. Accordingly, the Division properly denied the exemption.

F. In the alternative, petitioner asserts that the purchases during the audit period would nonetheless qualify for the exemption under Tax Law § 1105 (a) (12-a) as they constituted upgrades that allowed for the initiating, receiving, or switching of telecommunications services for sale. This argument is likewise rejected based on the reasoning set forth above, as the upgrades were to petitioner's customer care and data center, rather than the equipment that allowed for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services.

G. Accordingly, the petition of Cellco Partners d/b/a Verizon Wireless, is denied and the refund denial letters dated February 21, 2014 and July 18, 2014, are sustained.

DATED: Albany, New York
April 12, 2018

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE